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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1226

FLEMING FOODS OF ALABAMA, INC.,
Petitioner,

v.

DEPARTMENT OF REVENUE
STATE OF ALABAMA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Alabama

REPLY BRIEF OF PETITIONER

In its petition, Fleming Foods demonstrated that the decision of the Alabama Supreme Court upholding the State's use tax squarely conflicts with this Court's decisions construing the Commerce Clause because the tax is not fairly apportioned and has a discriminatory effect on interstate commerce. In addition, petitioner showed that due to the similarity of the constitutional issue posed by this case and the question presented by *Oklahoma* v. *Jefferson Lines, Inc., cert. granted,* 114 S. Ct. 2672 (1994) (No. 93-1677), the petition should, at a minimum, be held pending the Court's decision in that case.

1. Respondent concedes that "a state can only tax its fair share of an interstate transaction" (Opp. 8), the "central purpose behind the apportionment requirement" according to this Court. *Goldberg* v. *Sweet*, 488 U.S. 252, 260 (1989). However, respondent baldly asserts that this Court's decisions concerning fair apportionment, cited by petitioner, are somehow inapposite because there is "no revenue generated by Fleming Foods from outside

Alabama which Alabama seeks to tax." Opp. 8. As stated in the petition, "there can be no question that a use tax is imposed on the ultimate use of the vehicles." Pet. 9. Respondent ostensibly agrees. Opp. 8-9 (discussing the definition of "use"). The graven of petitioner's complaint, wholly unaddressed by respondent, is that Alabama asserts the right to tax *in full* the *use* of vehicles that the State readily concedes are used within the State for only 38% of their total mileage. To the extent that Fleming Foods' trucks and trailers are *used* in interstate commerce *outside* the State of Alabama—which is most of the time—the imposition of an unapportioned use tax on the full purchase price of the vehicles violates the Commerce Clause and the decisions of this Court cited in the petition.[1]

2. Respondent also scarcely addresses petitioner's argument that Alabama's use tax disproportionately burdens interstate commerce in violation of the Commerce Clause and this Court's decision in *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266 (1987). Respondent seeks to distinguish *Scheiner* simply by noting that Alabama's use tax "is not a recurring annual lump sum tax." Respondent cites no authority as to why this distinction matters under the Commerce Clause. Indeed, as the petition noted, this Court has eschewed evaluating the constitutionality of state taxes on the basis of form rather than function. Pet. 10. The discriminatory effect of Alabama's use tax is undeniable. Though respondent suggests that petitioner should have purchased its trucks

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[1] Without citation to supporting authority of any kind, respondent simply asserts that "the apportionment prong of the *Complete Auto* test is satisfied by providing a credit for sales or use taxes paid to other states." Opp. 7. Petitioner has already noted that multiple taxation is only *one* of the concerns of the Commerce Clause and the requirement of fair apportionment. Pet. 11. The limited credit provision of Ala. Code § 40-23-65 (1975) does not justify the State of Alabama's taxation of the full use of petitioner's vehicles. Pet. 11 (citing cases).

and trailers in Alabama (Opp. 9), this action would not change the fact that a trucking enterprise that uses its fleet wholly within Alabama bears the same tax burden as the trucking enterprise that uses an identically priced fleet only in part within the State. See Pet. 12. This "apparently neutral" use tax, like the tax in *Scheiner*, violates the Commerce Clause.

3. Finally, respondent asserts that it "does not agree that the facts and circumstances in *Oklahoma v. Jefferson Lines, Inc.*, Cert. granted, 114 S.Ct. 2672 (1994) (No. 93-1677), are the same as those in the present case." Opp. 4. This is no answer; and moreover, this assertion is manifestly contradicted by respondent's own representations to the Court.

Respondent claims its use tax is constitutionally sound because it is a " 'one time tax' " (Opp. 3), and because it is "imposed upon the retail purchase of tangible personal property" (*id.* at 6),[2] and not "upon revenues generated by the use of the trucks and trailers" (*id.* at 5). Moreover, respondent does not agree that its tax "should be apportioned based on the miles traveled within the State of Alabama" (*id.*). In *Jefferson Lines*, the State of Oklahoma has made precisely the same representations to the Court concerning its sales tax. It has argued that its sales tax is constitutional because it "taxes a single discrete transaction" (Oklahoma Merits Br. 21), and because it is levied "upon the sale of tangible personal property and certain services" (*id.* at 7-8), and not "Jefferson's revenues, whether generated in Oklahoma or otherwise" (*id.* at 12). Moreover, Oklahoma likewise has not agreed that its tax should be "apportioned according to the miles to be travelled in Oklahoma" (*id.*). It is clear that the

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[2] As noted in the petition, to the extent that use and sales taxes are complementary, there is no constitutionally significant difference between Alabama's use tax and Oklahoma's sales tax. Pet. 9. However, Alabama's tax is imposed on the use, not the purchase, of tangible personal property as asserted by respondent. *See* Ala. Code § 40-23-61 (1975).

State of Alabama is attempting to evade Commerce Clause scrutiny on the same basis as the State of Oklahoma in *Jefferson Lines,* and at a minimum this case should be held pending the Court's decision in that case.

* * * *

In sum, because the court below upheld the constitutionality of a use tax that is not fairly apportioned and results in discrimination against interstate commerce in direct conflict with the decisions of this Court, its decision should be reviewed. Nothing argued by respondent alters this conclusion.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending the Court's decision in *Oklahoma* v. *Jefferson Lines, Inc., cert. granted,* 114 S. Ct. 2672 (1994) (No. 93-1677), and then disposed of as appropriate in light of the Court's decision in *Jefferson Lines.*

Respectfully submitted,

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